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In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN MEDICAL ASSOCIATION,
CONNECTICUT STATE MEDICAL SOCIETY,
NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ERNEST J. ISENSTADT
Acting General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

MARCH COLEMAN
BARRY COSTILLO
Attorneys

Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether, in light of extensive evidence and detailed findings that a substantial part of the business carried on by the American Medical Association and its constituent state and local medical societies is for the profit of their members, the Federal Trade Commission properly determined that such associations are "corporations" within the jurisdiction of the Commission under Sections 4 and 5(a)(2) of the Federal Trade Commission Act.

2. Whether, in light of the substantial evidence supporting the Commission's findings (1) that AMA, its constituent state and local medical societies and their members had engaged in a conspiracy to impose anticompetitive restrictions on advertising, solicitation and contract practice by physicians, and (2) that there is a cognizable danger of a recurrence, the Commission abused its discretion by entering a cease-and-desist order tailored to remedy the violations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-31a) is reported at 638 F.2d 443. The Commission's opinion and order (Pet. App. 312a-373a) and the initial decision of the Administrative Law Judge (Pet. App. 37a-312a) are reported at 94 F.T.C. 701.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1980. A petition for rehearing was denied on November 25, 1980 (Pet. App. 375a). Jus-

tice Marshall extended the time for filing a petition for a writ of certiorari to and including April 8, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Pertinent portions of Sections 4 and 5(a) of the Federal Trade Commission Act, 15 U.S.C. 44 and 45(a), are set forth at Pet. App. 377a.

STATEMENT

Petitioner American Medical Association (AMA) is a not-for-profit, non-share corporation, most of whose members are practicing physicians (Pet. App. 4a). AMA is a federation of constituent medical societies, exemplified by petitioner Connecticut State Medical Society, which are in turn made up of local component societies, exemplified by petitioner New Haven Medical Society.[1]

In December 1975, the Federal Trade Commission issued an administrative complaint charging petitioners with violating Section 5 of the FTC Act, 15 U.S.C. 45, by agreeing to certain anticompetitive ethical restrictions (Pet. App. 33a-35a). After hearings in 1977 and 1978, an administrative law judge found that the Commission had jurisdiction over petitioners because they were "corporations" within the meaning of Section 4 of the Act, 15 U.S.C. 44; the

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[1] A doctor must belong to a local society to be a member of a constituent association, and must belong to a constituent association to be a member of AMA. In 1978, 60% of all American doctors, 75% of all office practitioners and 80% of all board certified practitioners were members of AMA (Pet. App. 41a-42a).

judge also concluded that petitioners had violated Section 5 by acting in concert to impose ethical restrictions that unlawfully interfered with their members' freedom to compete by truthful advertising and solicitation and by means of contractual arrangements with health care delivery organizations or with non-physicians (Pet. App. 37a-312a). The Commission sustained these findings and entered an appropriate cease-and-desist order in October 1979 (Pet. App. 312a-373a).

1. AMA is governed by a House of Delegates from its constituent societies. The House is empowered to amend AMA's constitution, bylaws and ethical principles (Pet. App. 313a). The restrictions at issue were, in the main, derived from Sections 4, 5 and 6 of the 1957 *Principles of Medical Ethics* (see Pet. App. 5a-6a n.1), which were in effect throughout the Commission proceedings (*id.* at 313a, 352a).[2] The Principles of Ethics are interpreted by the Judicial Council, a committee of the House of Delegates. AMA publishes and distributes these interpretations as *Opinions and Reports* of the Judicial Council. The anticompetitive restraints found unlawful by the Commission are principally contained in the 1971 edition of the *Opinions and Reports*. These restraints were effectively implemented and enforced through AMA's hierarchy of affiliated medical societies in numerous individual instances (Pet. App. 13a-14a, 334a-350a).

2. Section 5 of the *Opinions and Reports* set forth rulings that, save for a few narrow exceptions, proscribed advertising by which consumers might learn

[2] On July 22, 1980, after this case had been submitted to the court of appeals, AMA adopted a new version of the Principles (Pet. App. 17a, 30a n.4).

of the availability and prices of individual and collective offerings of physicians' services (Pet. App. 141a-227a, 336a). These rulings were derived from the unqualified ban on solicitation contained in Ethical Principle 5.[3]

The ethical restraints on contractual arrangements were aimed at agreements between physicians and health care entities under which the physician is compensated pursuant to an agreed fee schedule, or is paid a salary or fixed rate per patient. Such arrangements contrast with traditional fee-for-service practice, in which each physician sets his own fee for each patient. These restrictions were set forth in the 1971 *Opinions and Reports* (Pet. App. 343a-350a), and in a 1974 *Report on Physician-Hospital Relations* (Pet. App. 358a-359a). They were derived from interpretations of Ethical Principle 6, which bars a

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[3] The advertising and solicitation restrictions were applied by AMA's constituent and component societies to the dissemination of price information (Pet. App. 147a-150a), other information regarding individual physicians' services, and information about innovative and alternative forms of medical care delivery, including innovative clinics and preventive medicine programs offered, *inter alia*, to sophisticated purchasers of medical services such as industrial corporations (*id.* at 150a-160a, 216a-217a). The restrictions were also applied to health maintenance organizations and other pre-paid group practice plans (*id.* at 160a-168a). Restrictions on the methods physicians may use to advertise and solicit were invoked against announcements, form letters, and brochures (*id.* at 168a-173a); newspaper advertising (*id.* at 173a-178a); radio and television advertising (*id.* at 178a-180a); and even unpaid publicity in the news media (*id.* at 180a-194a). In addition, the restrictions were invoked against yellow-page listings (*id.* at 194a-199a) and listings in certain business and consumer directories (*id.* at 199a-216a).

physician from disposing of his services under "terms or conditions which tend to interfere with or impair the free and complete exercise of * * * medical judgment and skill or tend to cause a deterioration in the quality of medical care" (Pet. App. 5a n.1) These restrictions characterized as unethical financial arrangements involving physician compensation below the usual fee paid in the community, and underbidding by physicians to secure a contract (Pet. App. 344a-347a). The restrictions were also applied to contractual arrangements that purportedly deny a patient "free choice" of a physician by limiting that choice to some, rather than all, physicians in the community (*id.* at 348a-349a), or that depart from the traditional fee-for-service norm (*ibid.*). Furthermore, the restrictions proscribed partnership and other income sharing arrangements between physicians and non-physicians such as therapists and psychologists, unless ownership was solely in the hands of licensed physicians (*id.* at 349a-350a).

In April 1976 AMA's Judicial Council issued a statement on physician advertising and solicitation, which was later incorporated in part into a revised edition of the *Opinions and Reports* issued in March 1977.[4] The revision reaffirmed "the long-standing policy of the Judicial Council on advertising and solicitation by physicians," but stated that the "Principles [of Ethics] do not proscribe advertising; they proscribe the solicitation of patients" (Pet. App. 366a-367a).[5] Section 6 also recited that "[f]reedom

[4] The 1976 statement did not address the restrictions on contract practice.

[5] Advertising was defined as "the action of making information or intention known to the public." Solicitation was defined as "the attempt to obtain patients by persuasion or influence, using statements or claims that (1) contain testimonials,

of choice of physician and free competition among physicians are prerequisites of optimal medical care" (Pet. App. 367a).[6] These revisions were issued in response to "changing legal considerations," and administrative agencies' consideration of physician advertising and solicitation—apparently the Commission's complaint, which had been filed several months earlier (Pet. App. 244a-245a).

Upon issuing these revisions, however, AMA did not announce to its members or its affiliated societies any revocation or disapproval of prior ethical restrictions (Pet. App. 247a-248a, 353a). Indeed, the 1977 edition of the *Opinions and Reports* continued to use various phrases and formulations that had been employed to express the earlier ethical restrictions and these expressions continued to govern local applications of the revised edition. Thus, even after

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(2) are intended or likely to create inflated or unjustified expectations of favorable results, (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived" (Pet. App. 367a).

[6] Section 4.05 stated that "a physician may be employed by, or otherwise serve, a medical care plan without violating the principles of ethics" (Pet. App. 368a). Section 6.01 declared that a physician may ethically "provide medical services to members of a prepaid medical care plan or to members of a health maintenance organization which seeks members (or subscribers) through advertising its services, facilities, charges, or other non-professional aspects of its operation as long as such advertising does not identify, refer to, or make any qualitative judgment concerning any physician who provides service to the members or subscribers" (*ibid.*).

issuance of the 1977 edition, officials of AMA indicated that the prior ethical restrictions on solicitation and advertising were still in effect (Pet. App. 245a, 358a); and, despite the revisions, many constituent and component societies continued to apply the 1971 standards to restrict physician advertising, soliictation and contract practice (*ibid.*).

3. The Commission found that petitioners were "corporations" subject to its jurisdiction under Section 5(a)(2) of the FTC Act. Despite their formal not-for-profit status, the Commission determined that petitioners in fact were "organized to carry on business for [the] profit of [their] members" within the meaning of Section 4 of the FTC Act, because the record established that a substantial part of petitioners' activities was designed to engender a pecuniary benefit for their members, over and above benefits incidental to the associations' other professional activities (Pet. App. 128a-133a, 253a-266a, 314a-325a).

Turning to the merits, the Commission found an antitrust conspiracy among petitioner AMA and its constituent associations and component societies, and among all three petitioners and their physician-members, to impose the challenged restrictions on advertising and solicitation, and contract practice (Pet. App. 328a-334a). Applying antitrust law's "rule of reason" (see *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687-692 (1978)), the Commission found that the restraints on advertising and solicitation had substantial adverse effects on competition among health care providers, and that the restraints had no reasonable relationship to legitimate procompetitive ends that might justify properly tailored ethical restrictions (Pet. App. 334a-343a).

Similarly, it found that the restrictions on contract practice injured competition and were not reasonably related to the prevention of improper practices by physicians (Pet. App. 343a-350a). The Commission concluded that the "adequacy-of-fee" restraints were patently designed to limit price competition; that the ban on underbidding for contracts had the purpose and effect of suppressing competition, even absent formal enforcement of the restraints; that the "free choice" principle had, as its primary purpose, suppression of competitive activity by organized health care providers, not solicitude for the rights of patients; and that the restrictions on contract arrangements with entities not controlled by physicians had as its sole purpose preservation for the physician of the full profit generated by his or her services and preclusion of competition from group plans, hospitals or other organizations not directly controlled by physicians. Furthermore, the Commission determined that the restrictions on income sharing arrangements between physicians and non-physicians were broader than necessary to prevent either deception or undue influence over medical procedures by non-physicians (Pet. App. 343a-350a).

The Commission rejected AMA's claims that it should give decisive weight to AMA's post-complaint revisions of its published ethical interpretations, and that there was no cognizable danger of recurrent violations. After examining the 1977 revisions at length, the Commission found that the revisions themselves provided substantial evidence that violations might recur. In particular, the Commission noted the absence of an adequate disavowal of prior inter-

pretations,[7] the use of terminology linked to the past restrictions, the substantial ambiguities and equivocations in other terminology, and AMA's failure expressly to rescind or disavow the contract practices restrictions expressed in the 1974 *Report on Physician-Hospital Relations*[8] (Pet. App. 350a-359a).

The Commission entered an order barring AMA from interfering with physician advertising and solicitation, when not false, deceptive or overreaching; from interfering with the consideration to be paid physicians, and with other specified aspects of contract practice; from failing to require notice, hearing, and findings for ethical violations; and from failing to disaffiliate any constituent or component that does not adhere to the order's substantive requirements (Pet. App. 368a-373a).

4. On petitions for review, the court of appeals modified and enforced the Commission's order (Pet. App. 2a-31a). The court unanimously held that the evidence in the record sustained the Commission's jurisdictional finding that petitioners' activities promoting the pecuniary interests of their members were sufficiently substantial to bring petitioners within the definition of the term "corporation" in Section 4 of the Act (Pet. App. 9a-10a, 23a-25a). On the merits, the court concluded that substantial evidence

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[7] The Commission found (Pet. App. 352a n.73) that AMA continued distributing the 1971 *Opinions and Reports* until June 1976, a full year after this Court's decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), which held that professional associations are subject to the Sherman Act.

[8] As recently as 1977, the 1974 Report had been cited to the Commission by AMA as the best reflection of its position on contract practice (Pet. App. 358a-359a).

supported the Commission's findings that the ethical restraints imposed by petitioners had an anticompetitive purpose and effect (*id.* at 12a-14a). The court also held that the Commission had properly found the post-complaint revisions insufficient, since it was "not clear that the 1977 revisions rescinded prior ethical standards" (*id.* at 16a). Accordingly, the court ruled that the Commission had properly exercised its discretion by carefully considering the changes and rationally assessing their significance before concluding that a cease-and-desist order was warranted (*id.* at 17a).[9]

In dissent, Judge Mansfield concluded that the evidence did not support a finding of liability and

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[9] The court noted (Pet. App. 17a) the adoption, in July 1980, of a new version of the *Principles of Medical Ethics*, which removed the ban on "solicitation." It found, however, that the language of the 1980 Principles is general and imprecise, that the prior written interpretations of the 1957 Principles remained in effect, and that in the absence of any interpretation of the 1980 Principles, the Commission's order should stand (Pet. App. 17a-18a).

The court modified a provision of the order permitting AMA to adopt "reasonable ethical guidelines" with respect to representations that would be false or deceptive under Section 5 of the Federal Trade Commission Act. As modified, the order permits AMA to adopt guidelines concerning conduct that "respondent reasonably believes" would be false or deceptive within the meaning of Section 5 of the Act (Pet. App. 20a). At the Commission's request, the court also modified the order to make clear that the prohibition against interference with consideration offered to physicians for their services was addressed only to contracts with any entity that offers physician services to the public, and did not include professional peer review of fee practices (*id.* at 21a). Peer review of fee practices had not been an issue in the proceeding.

did not establish that violations were likely to recur (Pet. App. 26a-31a). His conclusions were based on his assessment of the effect of AMA's post-complaint changes upon AMA's earlier restrictions.

ARGUMENT

1. Petitioners contend (Pet. 14-18) that they are not "corporations" subject to the Commission's jurisdiction under Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(2). The court of appeals correctly rejected this contention, and further review of this fact-bound question (see *FTC* v. *Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979)) is not warranted.

Section 5(a)(2) of the FTC Act empowers the Commission to prevent "persons, partnerships, or corporations" from engaging in unfair methods of competition or unfair or deceptive acts or practices. "Corporation" is defined in Section 4 of the Act, 15 U.S.C. 44, "to include * * * any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, * * * which is organized to carry on business for its own profit or that of its members." The Commission held that these provisions confer jurisdiction over " 'nonprofit organizations whose activities engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity' " (Pet. App. 315a). Applying this test, the Commission ruled that it had jurisdiction over petitioners based on extensive findings (*id.* at 73a-95a, 117a-124a, 128a-133a, 257a-266a, 318a-325a)—findings which the court of appeals concluded were supported

by substantial evidence (*id.* at 10a)—that petitioners "are engaged substantially in activities which confer a pecuniary benefit upon their members" (*id.* at 318a).[10]

Thus the remaining question, given the Commission's unchallenged findings, is whether a non-profit association so engaged "is organized to carry on business for * * * [the] profit * * * of its members." 15 U.S.C. 44. In answering that question, the Commission properly placed the "principal focus upon the nature of [petitioners'] activities" (Pet. App. 315a). As the Commission acknowledged (*id.* at 319a), those activities include many scientific, educational and charitable efforts, but a very significant proportion of petitioners' activities is directed at serving the entrepreneurial and business needs of their physician members (see note 10, *supra*). The fact is that doctors earn their livelihood through their profession (cf. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 368-369 (1977)), and combine into pro-

[10] The evidence showed, for example, that AMA's articles of incorporation, as amended in 1902, stated as one of AMA's purposes "safeguarding the material interests of the medical profession" (Pet. App. 318a). Moreover, AMA literature (*e.g.*, *id.* at 75a) emphasized the "remarkable range of tangible benefits" (*id.* at 74a) conferred by AMA membership including insurance programs, AMA's retirement plan, physician placement service, legal information and guidelines, "professional management information and guides to increase the productivity and profitability of your practice" (*id.* at 318a-319a), and legislative and lobbying efforts to advance the views, interests and rights of AMA's membership (*id.* at 319a). In addition, the unlawful activities of petitioners in formulating restraints that had an anticompetitive purpose and effect (*id.* at 322a-323a, 336a-339a, 343a-350a) also conferred a pecuniary benefit on AMA members in their entrepreneurial efforts.

fessional associations in part to enhance that livelihood. Thus, the profession practiced by doctors, no less than that practiced by lawyers, engineers and others in learned professions, has a business aspect subject to laws regulating business behavior. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 (1975). Accord, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *American Medical Ass'n* v. *United States*, 317 U.S. 519 (1943). The court of appeals therefore correctly ruled, on this record, that petitioners' substantial activities promoting the business interests of their members were sufficient to bring petitioners within the Commission's jurisdiction.

There is nothing on the face of Section 4 of the FTC Act that suggests that private, collective regulation of such entrepreneurial activities, through an association of entrepreneur-professionals, is beyond the scope of the statute. Indeed, numerous cases have treated non-profit trade associations—similarly organized to advance their members' profit-making interests—as being within the scope of the FTC Act, even though such associations do not make any direct distribution of "profit" to their members. *E.g.*, *FTC* v. *Cement Institute*, 333 U.S. 683 (1948); *Millinery Creator's Guild, Inc.* v. *FTC*, 312 U.S. 469 (1941); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941); *FTC* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927). See *FTC* v. *National Comm'n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976).[11]

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[11] See also *Standard Container Mfrs. Ass'n* v. *FTC*, 119 F.2d 262 (5th Cir. 1941); *California Lumbermen's Council* v. *FTC*, 115 F.2d 178 (9th Cir. 1940), cert. denied, 312 U.S. 709 (1941); *Chamber of Commerce* v. *FTC*, 13 F.2d 673 (8th Cir. 1926); *National Harness Mfrs.' Ass'n* v. *FTC*, 268 F. 705 (6th Cir. 1920).

There is no merit to the contentions of petitioners (Pet. 14-16) and amicus curiae American Dental Association (ADA Br. 4-8) that the decision below conflicts with *Community Blood Bank of the Kansas City Area, Inc.* v. *FTC*, 405 F.2d 1011 (8th Cir. 1969). In *Community Blood Bank*, the Commission entered a cease-and-desist order against an alleged boycott of a commercial blood bank by a non-profit hospital association and a non-profit community blood bank. *Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 894, 974 (1966). It ruled that the two associations were operated for their own "profit" within the meaning of Section 4 because they could use any excess of income over expenditures for self-perpetuation or expansion. 70 F.T.C. at 907-908. In reversing the Commission's ruling, the Eighth Circuit quoted approvingly from the dissenting opinion of Commissioner Elman, who noted that " 'there is no contention that any of the corporate respondents is a device or instrumentality of individuals or firms who seek monetary gain through the nonprofit corporation.' " 405 F.2d at 1019, quoting 70 F.T.C. at 950. Thus, the court in *Community Blood Bank* did not reach the issue presented in this case—*i.e.*, whether the associations operated for the profit of their members.[12] Instead, the court held that the

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[12] The Eighth Circuit observed that even the associations' individual officers, directors, and employees "derived no personal profit, benefit or advantages in their individual occupations as * * * doctors * * * from their participation in the activities of the community-wide blood bank program." 405 F.2d at 1021. Petitioners erroneously state (Pet. 16 n.7) that the hospital association in *Community Blood Bank* "was similar to petitioners in all relevant respects." In fact, all but two of the forty-three members of the hospital asso-

Commission's sweeping definition of "profit" would, contrary to the intent of Section 4, embrace "any and all nonprofit corporations regardless of their objectives, motives and the results of their operations." 405 F.2d at 1015. The court concluded that Section 4 requires an *ad hoc* inquiry focusing on whether the organization "*engages in business for profit* within the traditional meaning of that language" (405 F.2d at 1018; emphasis in original), *i.e.*, gain made on business or investment (see *id.* at 1017). Under the Eighth Circuit's test, a non-profit corporation that operates only for charitable purposes and that only incidentally generates any traditionally-defined profit for itself or its members is beyond the reach of Section 4. 405 F.2d at 1017-1018. The Commission's ruling here is consistent with these standards. Its *ad hoc* inquiry into petitioners' activities revealed that petitioners were not engaged in public service activities only, but were also involved in substantial activities for the profit of their physician members who, like other professionals, practice for profit in the traditional sense of that term.

Petitioners' arguments based on legislative silence (Pet. 16-17) are similarly unavailing. Petitioners contend that the absence of any reference to professional associations in the original FTC Act of 1914, and in the legislative hearings and debates preceding its enactment, demonstrates that such organizations are exempt from coverage under the Act. As the Commission explained (Pet. App. 317a), however, such an approach is untenable because it would freeze

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ciation were non-profit entities; that two members were proprietary hospitals was noted but not discussed by the court. 405 F.2d at 1020 n.16.

the coverage of broadly worded business regulatory statutes to the economic setting prevailing at the time of their enactment, and would prevent their application to meet the changing needs of a dynamic society. Cf. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-173 (1968). Indeed, petitioners' reasoning would have prevented this Court from ruling as it did in *Goldfarb* and *Professional Engineers.*

Petitioners also contend that the existence of an exemption for professional associations is confirmed by the failure of the 95th Congress to enact certain legislative proposals. We disagree. The bills involved (H.R. 3816 and S. 1288, 95th Cong., 1st Sess. (1977)) would have given the Commission unqualified jurisdiction over *all* non-profit organizations, including those with no commercial aspects whatever. Such legislation would have made unnecessary the kind of *ad hoc* inquiry into the purposes and activities of non-profit associations that the Commission undertook here. Thus, as the Commission observed (Pet. App. 318a), "the subject of congressional inaction is broader in scope than the point for which it is cited." In these circumstances, Congress' rejection of the legislation, and the expressions of congressional opinion accompanying that rejection, are of little, if any, significance. *United States* v. *Southwestern Cable Co., supra*, 392 U.S. at 170. Moreover, an unsuccessful attempt by an agency to obtain legislative clarification of a general grant of regulatory jurisdiction is not evidence that the agency lacks the specific jurisdiction for which it seeks confirmation. *Ibid.* See also *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-611 (1966); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950).

Contrary to the contention of amicus curiae American Dental Association (ADA Br. 9), Judge Mansfield's separate opinion on this point does not evidence confusion over the proper interpretation of Section 4. The test adopted by Judge Mansfield [13] is the same test that the Commission applied and the majority approved. The majority's observation that business aspects of petitioners' activities are within the scope of the Act "even if they are considered secondary to the charitable and social aspects of their work" (Pet. App. 9a) simply restates the Commission's conclusion that profit-promoting activities need not be "dominant" so long as they are substantial, and not merely incidental (Pet. App. 317a).

2. Petitioners are mistaken in contending (Pet. 18-22) that the Commission improperly "disapproved" AMA's post-complaint changes without analysis of their competitive significance. The Commission's findings of liability were properly based upon the ethical restraints that had been concertedly imposed and enforced by petitioners prior to the filing of the administrative complaint in December 1975, and that had continued for some time thereafter. AMA's issuance of its April 1976 statement on advertising and solicitation and its publication of the March 1977 version of its *Opinions and Reports*, incorporating the 1976 statement and changing the ethical restrictions on contract practice, did not affect the legality of the ethical restraints challenged in the complaint. Rather, the post-complaint changes presented a different question: *i.e.*, whether they were

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[13] "[T]he appropriate test in my view would be whether the association engages in a substantial amount of activity for the pecuniary gain of its members" (Pet. App. 24a).

sufficient to establish that the public interest did not require issuance of a cease-and-desist order.

The Commission's resolution of that question turned solely on the Commission's assessment, based on the administrative record, of the relationship between the unlawful restraints and the post-complaint changes and, more specifically, whether and to what extent those changes signaled the continuation, extinction or revival of the unlawful restraints. Having found that the restraints had a significant anticompetitive effect, the Commission was not obligated to analyze *de novo* the competitive consequences of changes published in the *Opinions and Reports* some 16 months after the complaint was issued and to disregard the unlawful activity that had gone before. See *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957). As the court of appeals correctly held (Pet. App. 12a n.5), the Commission was not "required to amend its complaint at that point." The Commission, like the courts, has "an obligation, once a violation of the antitrust laws is established, to protect the public from a continuation of the harmful and unlawful activities." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48 (1960).[14] Thus, the Commission had only to consider, as it did, whether the revisions "obviate[d] any need to enter the Order herein" (Pet. App. 15a). As both the Commission (*id.* at 350a-361a) and the court of appeals (*id.* at 15a-18a) found, AMA's actions came tardily, reluctantly, and

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[14] Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that if the Commission finds that a respondent has engaged in conduct prohibited by the Act, "it shall state its findings as to the facts and *shall issue* * * * an order requiring such [respondent] * * * to cease and desist from doing such method of competition or such an act or practice" (emphasis added).

under the shadow of legal compulsion, and were insufficient to defeat the need for a remedy.[15]

Contrary to petitioners' contention (Pet. 20 n.10), the Commission's reliance on their precomplaint violations is not inconsistent with *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952), and *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Both cases held that when a violation has been found by a tribunal, it is in the discretion of that tribunal whether to grant injunctive relief. In each case the Court sustained the tribunal's choice because its discretion had been reasonably exercised. In *Oregon State Medical Society*, this Court stated that when a conspiracy in violation of the antitrust laws has been shown, "courts will not

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[15] Contrary to the impression conveyed by petitioners (Pet. 8, 19-20 & n.10), neither AMA nor its affiliates had repudiated or disavowed the illegal restraints at the time the Commission's complaint issued. Moreover, the record revealed continuation of the restraints after the filing of the complaint (see Pet. App. 148a-161a, 164a-167a, 171a-182a, 190a-191a, 196a-199a, 209a, 213a-214a, 237a-248a). AMA never unequivocally told its members that the 1971 *Reports* were superseded or rescinded. Indeed, its 1976 statement "reaffirm[ed] [AMA's] long-standing policy * * * on advertising and solicitation" (Pet. App. 353a). AMA's own officials failed to comprehend the asserted change in AMA policy (see pages 6-7, *supra*).

In addition, petitioners' statement (Pet. 8) that AMA did not defend the restraints in the 1971 *Opinions and Reports* is somewhat inaccurate. AMA denied that it ever enforced the restraints, repeatedly denied involvement in or responsibility for implementation of the restraints by AMA's affiliated societies, claimed the 1971 *Opinions and Reports* were purely "advisory" and protected First Amendment speech, and vigorously litigated the factual issues relating to the numerous instances in which the restraints were enforced by affiliates.

assume that it has been abandoned without clear proof" (343 U.S. at 333), and noted that "it is quite proper to trace currently questioned conduct backwards to illuminate its connections and means." *Id.* at 332. The Court added that examination of even clearly discontinued conduct is justified "when it illuminates or explains the present and predicts the shape of things to come." *Id.* at 333. Similarly, in *W. T. Grant*, this Court stressed that whatever determination it might have made *de novo*, on review the trier's exercise of discretion to grant or deny relief was controlling absent a strong showing of abuse. 345 U.S. at 633.

Here, the court of appeals properly held that "it is within the discretion of the FTC to determine whether an order is 'necessary to cope with the unfair practices found'" (Pet. App. 16a-17a, quoting from *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965)). Furthermore, the court below correctly found, after a thorough review, that "the FTC considered the changes and rationally assessed their significance in concluding that a cease and desist order was warranted" (Pet. App. 17a). Because the standards of *Oregon Medical Society* and *W. T. Grant* were followed in this case, there is no reason for this Court to review the assessment of the record by the Commission and the court below.[16]

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[16] Although petitioners do not present any question as to the content of the Commission's order, they erroneously imply (Pet. 20-22) that the Commission's order would prevent AMA from playing any role with respect to the problem of professional deception. In fact, the Commission expressly recognized that "the AMA has a valuable and unique role to play with respect to deceptive advertising and oppressive forms of solicitation by physicians," and permitted AMA "to adopt and enforce reasonable ethical guidelines" con-

Finally, the court of appeals noted (Pet. App. 17a) that in July 1980, AMA issued a revised version of the Principles of Ethics which differs in several respects from the 1957 Principles. Of course, there is nothing in the administrative record in this case concerning the meaning of the new Principles, or how AMA's Judicial Council and its affiliates will interpret and implement them. Moreover, as the court below pointed out, "the various written interpretations of the 1957 Principles previously promulgated by AMA remain in effect" (Pet. App. 17a-18a). We note, however, that once the Commission's order becomes final and effective (see 15 U.S.C. 45(g)), pe-

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cerning advertising and unfair solicitation (Pet. App. 361a-362a). Petitioners make no reference to the fact that the Commission's order, as modified by the court of appeals, expressly permits AMA to formulate, adopt, disseminate and enforce "reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representation, that [AMA] *reasonably believes* would be false or deceptive" within the meaning of Section 5 of the FTC Act (Pet. App. 20a). Petitioners do not contend—and could not reasonably argue—that this is "a test that cannot be met" or will force AMA and other professions "to abdicate their responsibilities" (Pet. 20, 22).

Petitioners state (Pet. 10) that the Commission's order prevents AMA from any involvement in the consideration paid to physicians, even involving "fee gouging and secret fee splitting arrangements." Petitioners do not discuss the unlawful restraints which the Commission found had the purpose and effect of limiting price competition and restraining competition from group health plans, hospitals, and similar organizations (see page 8, *supra*). Moreover, petitioners fail even to mention the court of appeals' modification of the order, at the Commission's express request, to make clear that the order was not intended to affect professional peer review of the fee practices of physicians (see page 10, note 9, *supra*).

titioners may, if they wish, request the Commission to reconsider its order on the ground that conditions have changed. Section 2 of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (to be codified at 15 U.S.C. 45 (b)).[17] See *FTC* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 395; *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 698-699.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ERNEST J. ISENSTADT
Acting General Counsel

WILLIAM F. BAXTER
Assistant Attorney General

HOWARD E. SHAPIRO
Deputy General Counsel

MARCH COLEMAN
BARRY COSTILLO
Attorneys
Federal Trade Commission

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[17] As recently amended, Section 5(b) provides in pertinent part that "the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part." The Commission is required to make its determination on any such request within 120 days after the request is filed.

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